FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 10 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 206

EUGENE KOSTER,

Petitioner,

against

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

MILTON POLLACK,
Attorney for Petitioner.

TABLE OF CASES

	PAGE
Di Giovanni v. Camden Fire Ins. Ass., 296 U. S. 64, at 69 (1931)	1
Pelcak v. Bartos, 328 Ill. App. 435, 66 N. E. 2d 465 (1946)	3
Venner v. Great Northern R. Co., 209 U. S. 24, at 33-35 (1908)	1
Winger v. Chicago City Bank & Trust Co., 325 Ill. App. 459, 60 N. E. 2d 560 (1945)	2
Winger v. Chicago City Bank & Trust Co., 67 N. E. 2d 265 (1946)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 206

EUGENE KOSTER,

Petitioner,

against

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

1. Respondent argues that the District Court had discretion to decline jurisdiction because the suit is in equity where jurisdiction is always discretionary (Br., pp. 8-9). But this argument confuses the merits of the case with the jurisdiction of the court. The chancellor's discretionary refusal to wield the powers of equity goes to the merits, not to the jurisdiction proper; *Di Giovanni* v. *Camden Fire Ins. Ass.*, 296 U. S. 64, at 69 (1931). It raises the issue whether the plaintiff is entitled to equitable relief, not in which court or district he should seek that relief. On a motion such as that at bar, addressed only to the jurisdiction, the merits are not open for decision; *Venner* v. *Great Northern R. Co.*, 209 U. S. 24, at 33-35 (1908).

2. For the same reason respondent's argument that petitioner improperly interferes with an insurance company's business (Br., pp. 11-12) is beside the point. If this suit constitutes such interference, it should be dismissed on the merits, not relegated to another district. Incidentally, the argument of interference was considered and rejected by the Court below (R. 45) on the strength of *Winger* v. *Chicago City Bank & Trust Co.*, 325 Ill. App. 459, 60 N. E. 2d 560 (1945). The latter case was recently affirmed by the Supreme Court of Illinois with an exhaustive opinion, *Winger* v. *Chicago City Bank & Trust Co.*, 67 N. E. 2d 265 (1946), which cuts the ground from under respondent's argument.

3. Equally inapposite to this motion are respondent's observations (Br., pp. 18-19) that petitioner, as a policy holder, is only a contract creditor and that he failed to exhaust an available administrative remedy. These grounds, too, bear on the merits, not on the propriety of the choice of forum. That they lack force even on the merits appears from *Winger* v. *Chicago City Bank & Trust Co., supra,* and *Pelcak* v. *Bartos*, 328 Ill. App. 435, 66 N. E. 2d 465 (1946).

4. The pendency of the *Schwartz* action in Illinois (Resp. Br., pp. 15-17) would seem quite immaterial. The *Schwartz* suit was instituted long after that at bar, in fact long after the District Court's decision herein. The District Court's jurisdiction, if properly invoked initially, could not subsequently be divested by the later suit of another policy holder. And it should be noted that the only real defendant served with process herein, the James S. Kemper & Co., Inc. (R. 1), is not even named as a defendant in the *Schwartz* suit.

5. Respondent assumes (Br., pp. 13-15) that the test of "vexatious or oppressive" gives the District Court the same latitude in declining jurisdiction as the test of "con-

venience, efficiency and justice". But clearly the two tests are not co-extensive (our main br., pp. 16-18); and respondent completely ignores the cases here and in England which give the terms "vexatious and oppressive" their narrow definition. "Convenience, efficiency and justice" control the exercise of jurisdiction only in those stereotyped categories of cases to which the doctrine of *forum non conveniens* traditionally applies (such as suits involving the internal affairs of foreign corporations and admiralty suits among foreigners). Assuming that even outside these categories the District Court has some freedom in refusing jurisdiction, yet its discretion is circumscribed by the narrow test of "vexatious or oppressive": The plaintiff must have chosen the forum in bad faith, for the purpose of preventing his adversary from getting justice. Such ulterior purpose has neither been alleged nor proved in this case.

Dated, October 9, 1946.

Respectfully submitted,

MILTON POLLACK,
Attorney for Petitioner.